STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

PRIMECO PERSONAL COMMUNICATIONS,	:	
v.	:	Docket No. 00-0670
ILLINOIS BELL TELEPHONE COMPANY d/b/a AMERITECH ILLINOIS,	:	
Complaint pursuant to Sections 13-514 and 13-515 of the Public Utilities Act.	:	

REDACTED PUBLIC VERSION

PETITION OF PRIMECO PERSONAL COMMUNICATIONS
FOR REVIEW OF HEARING EXAMINER'S DECISION

John W. McCaffrey
Kathleen R. Pasulka-Brown
Katherine A. Siddon
Foley & Lardner
Three First National Plaza
70 West Madison Street
Suite 4100
Chicago, Illinois 60602
(312) 558-6600

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PrimeCo Personal Communications ("PrimeCo"), through its counsel, pursuant to Section 13-515(d)(8) of the Public Utilities Act ("the Act"), 220 ILCS 5/13-515(d)(8), petitions the Illinois Commerce Commission (the "Commission") for review of the Hearing Examiner's Written Decision (the "Decision") entered on March 15, 2001, and requests that the Commission reject the Decision, and enter a final order in the form of Exhibit A attached to this Petition, which finds in favor of PrimeCo and enforces the provisions of Section 13-514 of the Act, 220 ILCS 5/13-514.

I. INTRODUCTION

PrimeCo is a regional provider of digital wireless telecommunications services that holds a Certificate of Service Authority issued by the Commission. PrimeCo's Complaint in this Docket is based on Section 13-514 of the Act, which prohibits a telecommunications carrier, such as Illinois Bell Telephone Company d/b/a Ameritech Illinois ("Ameritech"), from "knowingly imped[ing] the development of competition in any telecommunications service market," and describes various types of unreasonable

conduct that constitute per se impediments to the development of competition. 220 ILCS 5/13-514 (1)-(8).

Ameritech is an incumbent local exchange carrier that agreed to provide PrimeCo with high-speed transport service ("DS1 Service") that is essential to PrimeCo's network operations. The record evidence shows that due to Ameritech's continual and unreasonable provision of substandard DS1 Service to PrimeCo, PrimeCo's ability to compete effectively and efficiently in Illinois' wireless telecommunications market is being detrimentally affected, in violation of the express provisions of Section 13-514 of the Act.

Notwithstanding this evidence, the Hearing Examiner's Decision would grant PrimeCo no relief. As set forth herein, the Decision's analysis of Sections 13-514 and 13-515 of the Act and the evidence in the record is fundamentally flawed. The flaws in the Decision include:

- This is a case of first impression for the Commission and will establish how §13-514 and §13-515 will apply to incumbent local exchange carriers who act to impede the development of competition in Illinois' telecommunications service market and the development of competition and the ability of new competitors to seek redress from the anti-competitive activities of the incumbent local exchange carrier.

- As currently drafted, the Hearing Examiner's Decision will set a precedent that will make the remedy provided for in Section 13-514 and 13-515 of the Public Utilities Act unavailable to competitive providers seeking to challenge unreasonable actions of incumbent local exchange carriers who knowingly impede the development of competition. By requiring competitors to meet a wide range of supplementary, non-statutory requirements -- such as proof of industry standards that do not exist, showings of deliberate intent to impede competition, and demonstrations of discrimination -- the Decision creates barriers to the use of Sections 13-514 and 515 that the General Assembly never intended to impose. Unless the Commission corrects the Decision's erroneous conclusions about the scope of the Act and enters the attached order, the remedies provided for in Section 13-514 and 13-515 will be rendered meaningless because competitors will be unable to satisfy the requirements for invoking such relief.

- The Decision mischaracterizes PrimeCo's wholesale service quality complaint against Ameritech for failure to provide DS1 Service to PrimeCo [REDACTED] . This mischaracterization will allow Ameritech to continue ignoring service quality issues at the wholesale level, which in effect impedes the development of a competitive telecommunications market in Illinois. Contrary to the Decision findings,

  [REDACTED]

- [REDACTED] [REDACTED] was unreasonable and constitutes per se impediments to the development of competition under the language of Section 13-514.

- The Commission [REDACTED] [REDACTED] unreasonable and constitutes a per se impediment to the development of competition in Illinois' wireless telecommunications' service market.

- The Decision inappropriately rejects the performance standards agreed to by the parties and instead places the burden on PrimeCo to introduce into evidence an industry standard where one does not yet exist. By requiring Ameritech's failure to provide DS1 Service to be evaluated in terms of an industry standard, as opposed other reasonable performance standards [REDACTED] , the Decision is in direct opposition to the legislative intent of Section 13-514 of the Act. Section 13-514 is designed to apply to developing competitive telecommunications service market and as such also applies to services and technologies for which no industry standard has yet been developed or adopted by this Commission.

- The Decision fails to consider properly the facts and circumstances in the record that show that Ameritech's conduct was unreasonable.

  [REDACTED]

  The evidence also shows that Ameritech repeatedly made empty promises to PrimeCo, assuring PrimeCo that Ameritech would materially improve its performance, but failing to live up to those promises. In addition, the evidence shows that Ameritech had the ability to take actions or provide services to PrimeCo that Ameritech asserts would improve its performance, but Ameritech failed to take such actions or provide such services. Taken together, these facts show that Ameritech's conduct was and is unreasonable.

- The Decision improperly interprets the "knowledge" provision of Section 13-514 and therefore applies an inappropriate legal standard to Ameritech's failure to provide DS1 Service. The Decision finds that unless the carrier acted "in a knowing manner, with the intent to bring about the result of impeded competition" (Decision, p. 12) the conduct of a respondent telecommunications carrier is not unreasonable. This finding is contrary to Sections 13-514 and 13-515 of the Act. The knowledge provision of Section 13-514 is simply a notice requirement, which PrimeCo indisputably met by providing notice to Ameritech of its violations of Section 13-514 and by offering Ameritech 48 hours to correct the situation. 220 ILCS 5/13-515(c). Moreover, intent plays no role in a complaint under Section 13-514: the provisions of Section 13-514 that define the types of conduct that constitute per se impediments to competition do not require proof that a telecommunications carrier engaged in the conduct with any certain intent. Instead, under those provisions, only proof that a carrier actually engaged in the unreasonable conduct is necessary to show a per se violation. Such proof alone satisfies the requirement that a complainant prove a carrier is impeding the development of competition.

- The Decision incorrectly denies PrimeCo relief because PrimeCo did not prove that Ameritech discriminated against it. Again, the Decision improperly implies a proof requirement that is not included in the statute. Nowhere does Section 13-514 of the Act require that a complainant prove that a respondent telecommunications carrier discriminated against it. Under the express terms of the statute, PrimeCo's proof that Ameritech's conduct was unreasonable, that it falls within the per se provisions of Section 13-514, and that Ameritech had knowledge (i.e., statutory notice) of its alleged violations of Section 13-514, together are sufficient to establish PrimeCo's right to relief.

Accordingly, the conclusion reached in the Decision -- that the Commission has no power to grant PrimeCo relief for Ameritech's continued DS1 Service failures, even though Ameritech's failures were unreasonable and had a substantial adverse effect on PrimeCo's ability to compete in Illinois' wireless telecommunications market -- is incorrect as a matter of law. Thus, the Commission should reject the Decision, enter findings consistent with the evidence in the record, and issue an order in the form of Exhibit A hereto.

II. ARGUMENT

A. THE RECORD DEMONSTRATES THAT AMERITECH'S KNOWING PROVISION OF UNREASONABLY POOR QUALITY DS1 SERVICE IS IMPEDING THE DEVELOPMENT OF COMPETITION IN ILLINOIS' WIRELESS TELECOMMUNICATIONS MARKET AS A MATTER OF LAW

1. The DS1 Service Ameritech Provides PrimeCo Fails to Satisfy Reasonable Minimum Performance Standards

a.

[REDACTED]

As noted above, PrimeCo's Complaint is a statutory action under Section 13-514 of the Act,

[REDACTED]

[REDACTED]

[REDACTED]

In light of PrimeCo's evidence in this record, the Decision's statement that PrimeCo "failed to produce any evidence regarding any standard at all" (Decision, p.

13) is simply incorrect. Moreover, the Decision's statement that "the level or quality of service in the industry is the relevant inquiry in this proceeding" (Decision, p. 13) has no basis. Nothing in the Act suggests that unreasonableness under Section 13-514 must be judged under an industry standard. In fact, nothing in the record suggests that such a standard even exists. This makes sense, because in developing competitive markets, such as the one for DS1 Service for wireless carriers, there often is no industry standard. Accordingly, the Decision's comment that PrimeCo did not present testimony about "levels of service quality in the telecommunications industry" (Decision, p. 13) is of no moment.

[REDACTED]

b. The Record Shows that in Providing DS1 Service to PrimeCo, Ameritech Has Continually and Unreasonably Failed to Meet Reasonable Minimum Performance Standards

[REDACTED]

[REDACTED]

[REDACTED]

In light of this uncontroverted evidence, the Decision

[REDACTED]

[REDACTED]

acknowledges that "it is true that PrimeCo has suffered ongoing disruptions of service." (Decision, p. 12) There is thus no dispute that Ameritech has continually failed

[REDACTED]

Noting that the acts prohibited by Section 13-514 are each prefaced by the word "unreasonably," the Decision states that the complainant must allege and show that the "particular transgression was unreasonable," given "all the relevant surrounding circumstances," and that when the case of unreasonableness is based on the other party's conduct, the burden of proof is on the party asserting unreasonableness. (Decision, p. 12) PrimeCo agrees, and has easily met this burden in this Docket.

Indeed, PrimeCo has demonstrated in multiple ways that Ameritech's conduct is unreasonable.

[REDACTED]

Moreover, Ameritech has always been fully aware of the detrimental impact of its performance on thc operation of PrimeCo's network and of multiple ways to remedy the situation, but has made little, if any, improvement.

[REDACTED]

The Decision also notes a few assertions by Ameritech to explain its continually poor DS1 Service. None of these points, however, changes the unreasonableness of Ameritech's conduct. For example, the Decision notes Ameritech's assertion that the service required by PrimeCo involves "circuit locations not normally associated with wireless service." (Decision, p. 11) But Ameritech cannot reasonably blame its poor service on the location of PrimeCo's cell sites. PrimeCo's sites are by no means atypical; Ameritech's own witness, Dr. Debra Aron confirmed that at many PrimeCo sites, PrimeCo is collocated with other wireless providers.

[REDACTED]

In fact, Ameritech had been providing service to the majority of PrimeCo's sites under a 1996 contract, and thus was very familiar with the servicing of many of PrimeCo's sites well prior to entering the Contract. (Pr. Ex. 2 at 3-4)

Moreover, the Decision notes Ameritech's assertion that "PrimeCo is a relatively new customer compared to others and they receive the same service as other customers." (Decision, p. 11) There is no evidence in the record to support this statement. PrimeCo is by no means a newcomer in this market – PrimeCo initiated its service in the Chicago MTA in 1996. (PrimeCo. Ex. 2-G) Also,

[REDACTED]

[REDACTED]

As discussed elsewhere in this Petition, the record shows overwhelmingly that the service Ameritech provided was woefully inadequate.

Additionally, the Decision notes that there was testimony that all circuits are tested and are in working order prior to their acceptance by PrimeCo, from which the Commission infers that the circuits were initially operable. (Decision, p. 13) Yet once again, this fact does not change the unreasonableness of Ameritech's conduct. The fact that circuits may pass initial, rather perfunctory, tests is not relevant. Ameritech's records show that the circuits they use to provide PrimeCo's DS1 Service [REDACTED] . Whether those problems occur just after installation or months later makes no difference.

2. Ameritech's Provision of Unreasonably Poor DS1 Service Impermissibly Impedes Competition

a. Ameritech's provision of substandard DS1 service constitutes a per se impediment to competition under Section 13-514 of the Act.

Among the types of actions that constitute per se impediments to competition under Section 13-514 are:

(1) unreasonably refusing or delaying interconnections or providing inferior connections to another telecommunications carrier;

(2) unreasonably impairing the speed, quality, or efficiency of services used by another telecommunications carrier; [and]

(6) unreasonably acting or failing to act in a manner that has a substantial adverse effect on the ability of another telecommunications carrier to provide service to its customers.

220 ILCS § 5/13-514(1), (2) and (6). Ameritech's continual and unreasonable provision of substandard DS1 Service to PrimeCo falls within each of these provisions.

Section 13-514(1): Ameritech's DS1 circuits are the facilities that connect PrimeCo's cell sites to PrimeCo's switch. (PrimeCo Ex. 1 at 2, lines 75-77; Cane, 1/17/01 Tr. at 34) These connections are a critical element of PrimeCo's network; thus, PrimeCo relies on Ameritech's DS1 Service to provide reliable, high quality service to its own customers. (PrimeCo Ex. 1 at 2, lines 87-90)

[REDACTED]

, Ameritech is violating Section 13-514(1) of the Act by providing PrimeCo with "inferior connections." Because Ameritech has the technical ability to improve these connections but, without justification, continues not to make such improvements, Ameritech's conduct amounts to a per se violation of the Act.

While finding [REDACTED]

"insufficient to reach the threshold standard of knowingly impeding competition." (Decision, p. 13) Yet to establish that Ameritech's conduct fits within Section 13-514(1), PrimeCo need only show that Ameritech unreasonably provided inferior connections to PrimeCo. As explained below, the "knowing" element of the statutory claim is separate and distinct from the issue of whether Ameritech's conduct is the type of conduct that constitutes a per se violation of the statute. The result of categorizing conduct as a per se violation is that if a carrier's conduct falls within one of the provisions, the carrier is presumed to have impeded competition. "Knowing" as further explained below is basically a procedural requirement relating to notice.

The Decision also states that providing inferior connections under Section 13-514 "implies that either Ameritech knowingly supplies other competitors with better connections than PrimeCo; or it has better connections or circuits available which it refuses to give PrimeCo and this done with the intent to allow itself or other competitors to gain an unfair competitive edge." (Decision, p. 13) But nothing in Section 13-514 supports this interpretation. Providing inferior connections can merely mean inferior as compared to reasonable connections; there is no requirement of comparison to the connections others receive. Nor is there any statutory language that supports the Decision's reference to withholding better connections and/or providing inferior connections with intent to allow others an unfair advantage.

Section 13-514(2): Ameritech's provision of poor quality DS1 Service also unreasonably impairs the speed, quality and efficiency of services used by PrimeCo, which is prohibited by Section 13-514(2) of the Act. Since at least mid-1999, Ameritech has known that failures in the networks of its top ten customers (including PrimeCo) could be significantly reduced by: (1) replacing copper facilities with fiber (the report stated that "[f]iber facilities have a failure rate that is 25% that of copper"); (2) installing Automatic Protective Switch ("APS"); and (3) monitoring 90% of all DS1 circuits using its Preventative Maintenance-Centron ("PMC"). (PrimeCo Ex. 2-N) Notwithstanding these findings, Ameritech has not replaced and does not plan to replace all of PrimeCo's copper facilities with fiber. (Ameritech Ex. 3.0 at 4-5; see Papadakis, 1/18/01 Tr. at 548-49) Ameritech has installed APS [REDACTED] of PrimeCo's [REDACTED], and Ameritech does not monitor all of PrimeCo's DS1 circuits at its PMC (Ameritech Ex. 2.0 at 21, lines 1-4). Further, Ameritech has failed to take any other actions sufficient to materially improve the quality of its DS1 Service.

Ameritech's long-standing failure to take appropriate actions to improve its DS1 Service is unreasonable and, as set forth herein and as Ameritech knows, impairs the speed, quality and efficiency of the DS1 Service used by PrimeCo.

In discussing Section 13-514(2), the Decision notes that "[t]here appears to be some drop off [of callers], but the extent has not been documented." (Decision, p. 13) The Decision also states that there has not been evidence showing "the revenues lost or customer relations impacted," and that "[t]he losses suffered by PrimeCo's may be real, but mere generalizations without substantiation are not proof." (Decision, pp. 13-14) Yet such documentation, evidence, and proof are unnecessary. The violation at issue concerns unreasonably impairing speed, quality, and efficiency. By demonstrating that Ameritech has been failing to provide reasonable service, PrimeCo has made the proper showing for this violation. If Ameritech's service is unreasonable (as compared to reasonable standards), then it negatively affects speed, quality, and efficiency. The violation is per se and the impediment to competition is presumed, without independent proof of the type of facts cited in the Decision.

The Decision also notes testimony that PrimeCo "has been able to maintain its level of service through expedited expenditures and additional personnel." (Decision, p. 14) Yet PrimeCo's established ability to compensate for Ameritech's poor service quality cannot save Ameritech from its obligations under the Act. Even if this injury to PrimeCo is compensable elsewhere (such as court), if PrimeCo meets its burden of proof, it is entitled to relief under the Act.

Section 13-514(6): Finally, by providing PrimeCo with substandard DS1 Service and by failing to improve the quality of that service -- despite its repeated promises to do so and its ability to do so -- Ameritech is unreasonably acting in a manner that has

a substantial adverse effect on PrimeCo's ability to provide service to its customers in violation of Section 13-514(6) of the Act. (PrimeCo Ex. 5 at 3, lines 130-39) Although PrimeCo takes steps to ensure that it can provide its customers with reliable service despite Ameritech's poor quality DS1 Service (PrimeCo Ex. 1 at 6, lines 256-268; Prime Ex. 5 at 4, lines 173-75), the poor quality of Ameritech's service hampers PrimeCo's ability to economically provide the high quality, reliable service necessary for PrimeCo to compete effectively and efficiently in Chicagoland's wireless telecommunications market. (PrimeCo Ex. 5 at 3-5, lines 144-204) Thus, the record directly contradicts the Decision's claim that PrimeCo did not provide evidence about how Ameritech's actions or inaction has affected PrimeCo's ability to provide service to its customers. (Decision, p. 14))

Equally unfounded are the Decision's attempts to limit the applicability of Section 13-514(6). For instance, the Decision suggests that this section is restricted to situations in which a telecommunications carrier is "prevent[ed]" from providing service to its customers. (Decision, p. 14) While Section 13-514(6) would cover such situations, it is not limited to them; rather, it encompasses situations involving a "substantial adverse effect" on the ability to provide service to customers. Similarly, the Decision suggests that Section 13-514(6) "might include but be limited to a telecommunications carrier refusing to allow a competitor to collocate, use an easement or negotiate in good faith." (Decision, p. 14) But once again, nothing in Section 13-514(6) supports such limitations.

PrimeCo's proof that Ameritech engaged in any one or more of the actions described in Section 13-514(1), (2), or (6) establishes that Ameritech impeded the development of competition in the Illinois telecommunications service market in which

Ameritech provides PrimeCo with DS1 Service. (See 21st Century Telecom v. Illinois Bell Tel. Co., ICC No. 00-0219, 2000 WL 1344506 at * 30 (Jan. 15, 2000) (once wrongful conduct is proven, the consequences of that conduct are presumed).) Stated otherwise, such conduct is a per se impediment to the development of competition.

Regarding per se anti-competitive conduct, the court in Gilbert's Ethan Allen Gallery v. Ethan Allen, Inc., 162 Ill. 2d 99, 105, 642 N.E.2d 470, 473 (1994) (quoting Business Elec, Corp. v. Shard Elec. Corp., 485 U. S. 717, 723 (1988) and Maprese v. American Academy, 692 F.2d 1083, 1093 (1982) (emphasis added)) stated:

> 'per se rules are appropriate only for "conduct that is manifestly anti-competitive," [citation] that is, conduct "that would always or almost always tend to restrict competition" . . . If a practice is within the per se category, all you have to prove to establish a violation is that the defendant engaged in the practice; *you do not have to show that in fact the practice has had or will have an adverse effect on competition.*'

See Panzella v. River Trails School Dist. 26, 313 Ill. App. 3d 527, 729 N.E.2d 954, 960 (1st Dist. 2000) (teacher's dismissal was presumed to be for cause where school district based dismissal on conduct statute defined as per se cause for termination; school district was not required independently to prove conduct giving rise to termination satisfied the for cause requirement); People v. Daniel, 311 Ill. App. 3d 276, 285, 723 N.E.2d 1279, 1288 (2nd Dist. 2000) (because handguns are included in the statutory list of per se dangerous weapons, court presumed that defendant's threat to use a pistol was a threat to use a dangerous weapon even though no witness observed the pistol and the pistol was not displayed, produced at trial, or recovered)

The evidence in the record shows that Ameritech's provision of unreasonably poor quality DS1 Service satisfies the requirements of each of the above-quoted Section 13-514 categories of per se impediments to the development of competition. The evidence also shows that although Ameritech is capable of providing PrimeCo with

better quality DS1 Service, Ameritech has failed to do so, despite its [REDACTED] obligations and its repeated promises to improve its performance. (Pr. Ex. 2-E at §§ 13.3 and 13.5; 220 ILCS § 5/13-509.) Thus, Ameritech's failure to provide PrimeCo with adequate DS1 Service is unreasonable.

Accordingly, PrimeCo satisfied its burden of proving that Ameritech engaged in conduct the Act characterizes as a per se impediment to the development of competition. As a result, and contrary to the Decision's conclusion, Ameritech's inferior connections, impaired quality of service, and failures to correct its deficient service to PrimeCo do "meet the threshold standard contemplated by Section 13-514." (Decision, p. 14) PrimeCo is thus entitled to an order requiring Ameritech to provide DS1 Service that satisfies specific reasonable performance standards by a date certain. The Commission should therefore enter a final order, in the form of Exhibit A to this Petition, enforcing the provisions of Section 13-514 of the Act.

b. The uncontroverted evidence shows that Ameritech's poor quality DS1 Service increases PrimeCo's costs of doing business and detrimentally affects PrimeCo's ability to attract and maintain customers.

The Decision states that a party requesting relief under Section 13-514 must show that the other party's acts resulted in harm to the complaining party. (Decision, p. 13) Here, because Ameritech's violations are per se, they are impeding competition by definition and harm is presumed. (21st Century Telecom, ICC No. 00-0219, 2000 WL 1344506 at * 30) PrimeCo need make no other showing to obtain relief.

Nonetheless, and though unnecessary, the record does contain significant evidence of the harm that Ameritech's conduct has caused to PrimeCo. PrimeCo

witness D. Kraig Pyer ("Pyer"), PrimeCo's Vice-President and General Manager, Midwest Region, explained that the Chicago market is the third largest telecommunications market in the United States and that there is intense competition among PrimeCo, the approximately five other network-based market participants, and companies that act as resellers. (PrimeCo Ex. 5 at 2, lines 62-76) Consequently, PrimeCo must have the ability to control its costs in order to maintain the pricing flexibility required to compete effectively in this market. (PrimeCo Ex. 5 at 3, lines 103-08)

[REDACTED]

In addition to maintaining pricing flexibility, to compete successfully in the Chicago market and attract and maintain customers, PrimeCo must consistently provide very high quality service. (PrimeCo Ex. 5 at 3, lines 101-10) This is particularly true because PrimeCo, as a regional carrier, is competing against national

carriers that are not as dependent on their service quality reputations in the Chicago market as is PrimeCo. (PrimeCo Ex. 1 at 2-3, lines 95-101; PrimeCo Ex. 5 at 2, lines 101-10) Ameritech's provision of unreasonably poor DS1 Service detrimentally affects PrimeCo's ability to attract and maintain customers because the frequent failure of Ameritech DS1 circuits reduces the capacity, quality and reliability of PrimeCo's network. (PrimeCo Ex. 1 at 6, lines 272-78; PrimeCo Ex. 3 at 6-7, lines 295-312; Cane, 1/17/01 Tr. at 98-109)

[REDACTED]

PrimeCo has no viable means of remedying this situation because there are no alternative service providers from which PrimeCo reasonably can obtain sufficient DS1 Service to replace Ameritech's DS1 Service. (PrimeCo Ex. 2 at 14-16, lines 677-776) The Decision notes that other providers might be willing to provide service if PrimeCo would pay for the costs of the build out. (Decision, p. 14) But the record shows that PrimeCo cannot pay for buildouts and then compete, as the price of the buildouts is too high. (Pr. Ex. 1 at 15) There is thus no reasonable way for PrimeCo to replace Ameritech's DSI Service.

3. By Its Conduct, Ameritech Knowingly Is Impeding the Development of Competition in Illinois' Wireless Telecommunications Market

To bring an action under Section 13-514, a party must show that the telecommunications carrier about which the party is complaining is "knowingly" impeding the development of competition in a telecommunications service market. 220 ILCS 5/13-514. Meeting this requirement is basically procedural: when a complainant has notified a respondent of an alleged violation of Section 13-514 and has offered the respondent 48 hours to correct the situation, a rebuttable presumption that this requirement has been met is created. 220 ILCS 5/13-515(c).

Here, on October 12, 2000, PrimeCo sent Ameritech a letter specifically describing the poor quality of Ameritech's DS1 Service. (PrimeCo Complaint, Ex. A; PrimeCo Ex. 1 at 9, lines 422-25) In that letter, PrimeCo expressly advised Ameritech that Ameritech's "provision of DS1 Service to PrimeCo is unreasonably poor in quality and impedes PrimeCo's ability to effectively compete in the wireless telecommunications market in Illinois." (Verified Complaint, Ex. A at 1) Further, PrimeCo noted the unacceptable results of Ameritech's DS1 Service for the twelve-month period ending August 31, 2000, specifically pointing out, among other things, the excessively high unavailability and failure rates of Ameritech's DS1 circuits

[REDACTED]

Ameritech has failed to correct the violations described in PrimeCo's October 12, 2000 letter. (PrimeCo Ex. 1 at 9, lines 429-30) By that letter, PrimeCo created a rebuttable presumption of knowledge on Ameritech's part. Because that presumption

was never rebutted, PrimeCo indisputably met the knowledge requirement for its claim.

Moreover, the record contains additional evidence that independently shows Ameritech's knowledge of its ongoing violations. Ever since executing the Contract, Ameritech has been fully aware of the poor quality of the DS1 Service it provides PrimeCo and the adverse effect its poor quality service has on PrimeCo's ability to compete. (PrimeCo Ex. 1 at 7, lines 324-43, at 8, lines 357-66, at 9, lines 408-17; e.g., PrimeCo Ex. 2-A, 2-B, 2-L, 2-M, 2-N, 2-P) Notwithstanding Ameritech's knowledge and the extended period of time Ameritech has had to improve its DS1 Service, the evidence shows that Ameritech has simply failed to devote sufficient resources to this task. (PrimeCo Ex. 9) Instead, it appears that Ameritech continually has attempted to appease PrimeCo with empty promises, and thereby avoid expending the resources necessary to fulfill [REDACTED] . (PrimeCo Ex. 1 at 8-9, lines 389-401; see generally PrimeCo Ex. 2-N)

In a number of places, the Decision tries to import the knowledge requirement into the three per se violations at issue here. For instance, with respect to Section 13-514(2), the Decision states that PrimeCo has not shown that Ameritech's actions "were done knowingly...." (Decision, p. 14) Moreover, near the end of the Decision, the Decision concludes that when requesting relief under Section 13-514 of the Act, a complainant must demonstrate by competent evidence that a party has "knowingly committed the acts complained of ...." (Decision, p. 14) Yet there is no knowledge element in any of the per se violations of 13-514. As the Commission made clear in 21st Century Telecom, ICC No. 00-0219, 2000 WL 1344506 at * 30, the per se provisions of Section 13-514 require proof of unreasonable conduct, regardless of

knowledge or the lack thereof. Indeed, under the Act, Ameritech impedes, by definition, if it commits per se acts. Ameritech acts knowingly if it has notice that it allegedly is violating the Act.

The Decision also claims that the knowledge requirement contains an element of intent. (Decision, p. 12) For instance, the Decision states that conduct under Section 13-514 "must be done in a knowing manner, with the intent to bring about the result of impeded competition, " (Decision, p. 12) and concludes that there was no evidence that Ameritech acted with intent to harm PrimeCo or to grant other competitors an unfair advantage. (Decision, p. 13) Yet nowhere in the language of Section 13-514 is there any such requirement. Nor can any such requirement be implied. County of Knox v, Highlands, 188 Ill. 2d 546, 556, 723 N.E.2d 265, 263 (2000).

Thus, PrimeCo is not required to prove that Ameritech *intended* to knowingly impede the development of competition. PrimeCo need only prove, as it has, that Ameritech impeded the development of competition knowingly, which Ameritech may have intended to do or may have done unwittingly through its unreasonable conduct toward PrimeCo.

While this is admittedly a case of first impression under Section 13-514,[1] the provisions of the Act clearly address the type of conduct in which Ameritech has engaged. Section 13-514 is not a criminal statute. It does not require, as the Decision suggests, evidence that Ameritech is acting "in an effort to harm" PrimeCo, and that

[1] To date, most complaints filed under Section 13-514 of the Act appear to have involved disputes pertaining to interconnection or interconnection agreements. Thus, PrimeCo's Complaint against Ameritech, which is based on Ameritech's continuous provision of unreasonably poor quality DS1 Service under a competitive contract, raises an issue of first impression for the Commission. Based on the express terms of Section 13-514 of the Act and

its unsuccessful efforts to provide better service were "merely a subterfuge or a sham." (Decision, p. 13)

B. SECTION 13-514 DOES NOT REQUIRE PROOF OF DISCRIMINATION

The Decision concludes that PrimeCo has not shown that the service it received "is different than others in the market are receiving," and that, absent such a showing, there can be no violation of Section 13-514. (Decision, p. 13) This conclusion is wrong for at least two reasons.

First, and fundamentally, Section 13-514 does not require proof of discrimination. To prove that a telecommunications carrier is impeding the development of competition in a telecommunications service market, a complaining party need only prove that the conduct of the respondent telecommunications carrier is unreasonable. (220 ILCS § 5/13-514; 21st Century Telecom, ICC No. 00-0219, 2000 WL 1344506 at * 23 ("Each of the prohibited actions listed in Section 13-514 is prefaced with the term 'unreasonably' .... It must also be alleged and shown that the particular transgression was unreasonable in light of all the relevant surrounding circumstances."))[2]

Thus, PrimeCo does not have to prove that Ameritech engaged in improper discrimination, i.e., "the act or practice on the part of a common carrier of

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the overwhelming evidence in the record in this Docket, the Commission can and should resolve the issue raised in this proceeding in favor of PrimeCo and against Ameritech.

[2] Ameritech's contention that 21st Century Telecom supports the proposition that PrimeCo must prove that Ameritech discriminated against it (Am. Int. Br. at 20) is untenable. In that case, the Commission denied relief under Section 13-514 based on the complainant's failure to prove discrimination because complainant's theory of the case was that Ameritech had discriminated against it. (Id. at * 25-27.) PrimeCo's Complaint is not based on discrimination. It is based on Ameritech's knowing and *unreasonable* provision of poor quality DS1 Service. Accordingly, PrimeCo does not have to prove discrimination.

discriminating (as in the imposition of tariffs) between persons, localities, or commodities in respect to substantially the same service." (Webster's Third New Int'l Dictionary at 648 (1961); see County of Knox, 188 Ill. 2d at 556, 723 N.E.2d at 263 (to determine plain meaning of statute, court relied on dictionary definitions of the words used therein).) Instead, PrimeCo only had to prove that Ameritech's provision of DS1 Service was unreasonable, i.e., that it evinced Ameritech's "indifference to ... appropriate conduct exceeding the bounds of reason." (Webster's Third New Int'l Dictionary at 2507 (1961).) PrimeCo met this burden by proving that Ameritech's DS1 Service

[REDACTED]

[REDACTED]

C. PRIMECO'S CLAIMS ARE BASED ON VIOLATIONS OF SECTION 13-514 [REDACTED]

PrimeCo's claim in this proceeding is that Ameritech's unreasonably poor quality DS1 Service violates Section 13-514 of the Act, which prohibits telecommunications carriers from "knowingly imped[ing] the development of competition in any telecommunications service market." (See generally PrimeCo's Verified Complaint ("Complaint"); 220 ILCS § 5/13-514.) Thus, as noted above, PrimeCo's claim is a statutory claim based on Section 13-514 of the Act,

[REDACTED]

The Decision's misunderstanding of the role that the Contract plays in this proceeding is apparent from its conclusion that "it is not a contract that gives rise to a claim under the statute rather it is the action or inaction of a carrier that is the catalyst." (Decision, p. 12) This is not a contract action and PrimeCo has never suggested that it is. It is a complaint proceeding under Sections 13-514 and 13-515.

[REDACTED]

A further indication of the Decision's misunderstanding of the role of the Contract in this proceeding is its suggestion that, because the "losses suffered by PrimeCo ... may be recompensable in a Court of Law or under the contract," the Commission has no power to provide relief under Section 13-514. (Decision, p. 14)

[REDACTED]

Section 13-514 gives PrimeCo the right to request relief under Section 13-514 and, when the requirements of the statute are satisfied, as they are here, the Commission has the power to grant relief.

That PrimeCo might bring an action in a court of law for breach of contract, as the Decision suggests (Decision, p. 14), does not prevent PrimeCo from seeking relief under Section 13-514. (Cf. Armstrong v. Guigler, 174 Ill. 2d at 292, 673 N.E.2d at

295-96 (because "a party may ... proceed under either contract theory or tort theory upon the same set of facts [citation omitted], it does not follow that the contract action and the tort action merge into a single cause").)

[REDACTED]

[REDACTED]

D. AMERITECH'S INADEQUATE AND UNSUCCESSFUL EFFORTS TO CORRECT PROBLEMS PROVIDE NO DEFENSE

The Decision comments that Ameritech "made numerous efforts to correct the problems with the DS1 Service provided to PrimeCo," (Decision, p. 13), suggesting that such efforts make Ameritech's service failures less unreasonable. Yet efforts to improve do not transform unreasonable conduct into reasonable conduct. This is particularly true when, like here, the efforts to improve are ineffective for an extended period of time.

Indeed, Ameritech has had years to improve its service to meet the minimum standards that it itself established, and has had the ability to make such improvement. Yet its efforts have been completely inadequate and unsuccessful. [REDACTED] its initiatives have been woefully deficient, and have had no material impact on the quality of the DS1 Service Ameritech provides to PrimeCo. (Pr. Exs. 2A, 2B, 9) Moreover, the evidence in the record shows that the majority of Ameritech's initiatives are not intended to improve

Ameritech's poorly performing network plant, but rather to address outages *after* they occur. (Pr. Int. Br. at 23)

If anything, Ameritech's minimal efforts demonstrate how knowing Ameritech's service failures were. But one thing is clear. The fact that Ameritech made some efforts to improve does not provide a defense under Section 13-514. The record shows consistent and unreasonable failures to meet minimal standards of service that violate the Act's requirements.

II. RELIEF REQUESTED

The Decision states [REDACTED] . (Decision, p. 11) This is true, but not relevant.

[REDACTED] , it is seeking relief under Sections 13-514 and 13-515 of the Act. And PrimeCo's proposed relief is consistent with Section 13-515(d)(7), which provides that if a violation is found, a decision is to establish "directions and a deadline for correction of the violation." 220 ILCS 5/13-515(d)(7).

In its Complaint PrimeCo requested that the Commission order Ameritech to provide PrimeCo with DS1 service that met reasonable performance standards sufficient to allow PrimeCo to compete in the highly competitive wireless telecommunications market in Illinois. In its Initial Brief, PrimeCo presented an alternative form of relief, which would, among other things, use standards that were more convenient for Ameritech to apply [REDACTED] . In its reply brief and in the accompanying proposed order, PrimeCo requested this alternative form of relief. From PrimeCo's perspective having Ameritech ordered to provide DS1 service

that meets [REDACTED]

or the alternative standard proposed in PrimeCo's Initial and Reply Briefs are both acceptable. However, due to Ameritech's objection to the alternative standard, PrimeCo will request relief that utilizes

[REDACTED]

PrimeCo requests that the Commission Order that by April 1, 2002, Ameritech shall ensure that its DS1 Service satisfies the following reasonable performance standards [REDACTED] - unavailability of [REDACTED]for no fewer than seven months of any twelve-month period, and a failure rate [REDACTED] for no fewer than seven months of any twelve-month period (except that, if at any point during the first twelve months following the entry of this Order Ameritech fails to meet the standards of [REDACTED] unavailability per month for any six months of such period, or of [REDACTED] failure rate per month for any six months of such period, Ameritech shall be in violation of this Order).

PrimeCo further requests that the Commission Order that within 21 days of the entry of this Order, Ameritech shall provide PrimeCo and the Commission's Staff with a copy of the Action Plan (in which Ameritech shall describe the specific actions that it will take to satisfy the performance standards set forth above, the expected results of each of those actions, and the date(s) on which each action will be taken), that PrimeCo shall be permitted to respond to such Plan within ten days of its receipt of the Plan, that the parties shall engage in a good faith effort to resolve any differences, and that if resolution is not reached, either party shall have the right to file a request for Commission review of the Plan in this Docket.

PrimeCo further requests that the Commission Order that each month from the

entry of this Order and continuing as long as the 1998 Contract (including amendments and extensions) is in force, Ameritech shall provide PrimeCo and the Commission's Staff with a report regarding the status of Ameritech's implementation of its Action Plan, as well as monthly performance results for Ameritech's DS1 Service to PrimeCo in Illinois that measure unavailability and failure rate, and Ameritech shall make the data on which such performance results are based available for review by the Commission's Staff or PrimeCo upon request.

Finally, PrimeCo requests that the Commission order that Ameritech be assessed and pay, in accordance with Section 13-515(g) of the Act, all of the Commission's costs of investigation and conduct of the proceedings in this Docket.

III. CONCLUSION

For the reasons stated herein and appearing of record in this Docket, PrimeCo Personal Communications respectfully requests that the Commission reject the Hearing Examiner's Written Decision, dated March 15, 2001, enter findings consistent with the evidence, and enter an order, in the form of Exhibit A hereto, directing Ameritech to correct its violations of Section 13-514 of the Act by providing PrimeCo with DS1 Service that satisfies the reasonable performance standards PrimeCo proposed herein.

Dated: March 20, 2001

Respectfully submitted,

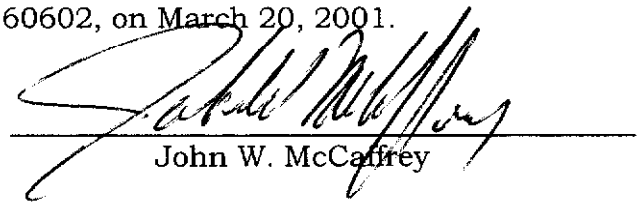
PRIMECO PERSONAL COMMUNICATIONS

By _____
One of Its Counsel

John W. McCaffrey
Kathleen R. Pasulka-Brown
Katherine A. Siddon
Foley & Lardner
Three First National Plaza
70 West Madison Street
Suite 4100
Chicago, Illinois 60602
(312) 558-6600

PROOF OF SERVICE

I, John W. McCaffrey, one of counsel to PrimeCo Personal Communications, hereby certify that copies of the foregoing Petition for Review were served on each of the persons on the attached Service List, at the addresses specified, by e-mail and by the means of service indicated on the attached service list, at Three First National Plaza, 70 W. Madison St., Chicago, Illinois 60602, on March 20, 2001.



John W. McCaffrey

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

PRIMECO PERSONAL COMMUNICATIONS,	:	
	:	
v.	:	
	:	Docket No. 00-0670
ILLINOIS BELL TELEPHONE COMPANY d/b/a AMERITECH ILLINOIS,	:	
	:	
Complaint pursuant to Sections 13-514 and 13-515 of the Public Utilities Act.	:	

NOTICE OF FILING

TO: Service List

PLEASE TAKE NOTICE that on March 20, 2001, we filed with the State of Illinois, Illinois Commerce Commission, PrimeCo's Petition for Review of Hearing Examiner's Written Decision in both the Redacted Public Version and the Confidential and Proprietary Version, copies of which are hereby served upon you.

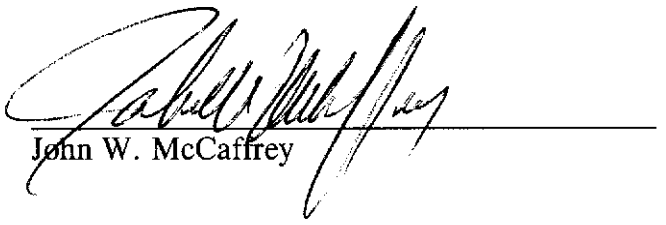
Dated: March 20, 2001

John W. McCaffrey
Kathy Pasulka-Brown
Hopkins & Sutter -- 90393
Three First National Plaza
Suite 4300
Chicago, Illinois 60602
(312) 558-6600

Attorneys for PrimeCo Personal Communications

PROOF OF SERVICE

I, John W. McCaffrey, one of counsel to PrimeCo Personal Communications, hereby certify that copies of PrimeCo's Petition for Review of Hearing Examiner's Written Decision in both the Redacted Public Version and the Confidential and Proprietary Version were filed with the clerk of the commission and copies were served on each of the persons on the attached Service List, at the addresses specified, by e-mail and in the manner indicated on the Service List, at Three First National Plaza, 70 W. Madison St., Chicago, Illinois 60602, on March 20, 2001.



John W. McCaffrey

SERVICE LIST
ICC DOCKET NO. 00-0670

Donna Caton
Chief Clerk
Illinois Commerce Commission
527 East Capitol Avenue
Springfield, Illinois 62701

Hearing Examiner Sherwin Zaban
Illinois Commerce Commission
160 North LaSalle Street
Suite C-800
Chicago, Illinois 60601
E-Mail: szaban@icc.state.il.us
Hand Delivery

Joseph D. Murphy, Esq.
Meyer Capel
A Professional Corporation
306 West Church Street
Champaign, Illinois 61826-6750
(217) 352-1800 or (217) 352-0030 (voice)
E-Mail: jmurphy@MeyerCapel.com
Federal Express

Karl B. Anderson, Esq.
Counsel
Illinois Bell Telephone Company
d/b/a Ameritech Illinois
225 West Randolph Street
Floor 29B
Chicago, Illinois 60606
E-Mail: karl.b.anderson@msg.ameritech.com
Hand Delivery